

No. 10,940

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

KOA GORA,

Appellant,

VS.

TERRITORY OF HAWAII,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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*To the Honorable United States Circuit Court of
Appeals for the Ninth Circuit:*

The appellant Koa Gora respectfully petitions for a rehearing in the above entitled cause. The following grounds are urged:

1. The accusation is and was insufficient.
 2. The insufficiency of the accusation could not have been cured by a bill of particulars.
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1. THE ACCUSATION IS AND WAS INSUFFICIENT.

It is recognized by the opinion of the court that a defendant is entitled to be informed of the nature and cause of the accusation in order that he may meet it and prepare for trial, and after judgment be able

to plead the record and judgment in bar of a further prosecution for the same offense. That such is the law, may not be doubted.

Wong Tai v. United States, 273 U. S. 77, 80-81,
47 S.Ct. 300, 301, 71 L.Ed. 549.

And the requirement of the law is that the accusation must be direct, positive, certain, and particular.

United States v. Cruikshank, 92 U. S. 542,
557-8, 23 L.Ed. 588, 593.

In the present case the court decided that the requirement of the law was satisfied by an accusation which charged that on a specified date the defendant "did do that which was lewd and lascivious in conduct". It is said in the opinion that "in order to protect himself from a second prosecution, appellant may resort to the record and even to oral testimony to prove his prior conviction".

But the appellant and petitioner respectfully points out that if he is again accused in the same language of the accusation now held sufficient, he will not be informed that he is being prosecuted for the same offense. The effect of the decision, therefore, is to permit accusations so cryptic in form and character that a defendant facing them cannot determine that he is again being prosecuted for the same offense. That, it is respectfully submitted, does not satisfy the requirement of law recognized by the opinion of the court.

2. THE INSUFFICIENCY OF THE ACCUSATION COULD NOT HAVE BEEN CURED BY A BILL OF PARTICULARS.

It is indicated by the opinion that the appellant may not complain of the insufficiency of the accusation because he failed to ask for a bill of particulars. The contrary rule has heretofore prevailed in this circuit. Thus in *Foster v. United States*, 253 F. 481, this court said at page 483:

“The bill of particulars could not avail to cure the defect of the indictment.”

And in *Collins v. United States*, 253 F. 609, it was said, at page 610:

“It should be premised that a bill of particulars can in no way aid or render sufficient an indictment fundamentally bad. * * * The bill of particulars, therefore, filed by the prosecuting attorney, can in no way aid the sufficiency of the indictment.”

It is respectfully urged that the present decision should be made uniform with the foregoing decisions or else they should be directly overruled.

Wherefore, it is respectfully submitted that a rehearing should be granted in the above entitled cause.

Dated, San Francisco, California,
February 1, 1946.

FRED PATTERSON,
E. J. BOTTS,
HERBERT CHAMBERLIN,
*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

The undersigned, counsel for appellant in the above entitled cause, hereby certifies that in his judgment the foregoing Petition for Rehearing is well founded, in both law and fact, and that it is not interposed for delay.

Dated, San Francisco, California,
February 1, 1946.

HERBERT CHAMBERLIN,
*Attorney for Appellant
and Petitioner.*

